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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted]

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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The NAACP Legal Defense and Educational Fund, Inc., hereby moves for leave to file the attached brief as amicus curiae.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist black persons in securing their constitutional and other rights by prosecuting and defending law suits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys for the Legal Defense Fund have represented parties in litigation before this Court involving demonstrations and picketing. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

The Legal Defense Fund believes that its experience in litigation arising out of picketing and demonstrations may be of assistance to the Court in this case.

WHEREFORE, the NAACP Legal Defense and Educational Fund, Inc., respectfully prays that this motion be granted and that the attached brief be filed.

Respectfully submitted,

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

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STATEMENT OF INTEREST

This case, though immediately concerned with the First Amendment rights of labor organizations, has far broader ramifications. The previous decisions of this Court have drawn no

sharp distinctions between labor picketing to induce consumer boycotts and similarly motivated picketing by other organization. See, e.g., Hughes v. Superior Court, 339 U.S. 460, 466 (1950). The principles developed in labor cases have been relied on in analyzing the First Amendment rights of picketing to protest government conduct. Cox v. Louisiana, 579 U.S. 559, 563-4 (1965).

Picketing, along with larger public demonstrations, has served historically as a vital vehicle for protesting racial discrimination and social injustice. Such public protests played an essential role in the civil rights movement of the last decade. Picketing in particular served to focus attention on employers, public accommodations or voting registrars that engaged in discriminatory practices. The cumulative effect of the particular instances of discrimination thus highlighted increased the nation's awareness of invidious racial practices, and spurred the public debate which led ultimately to the adoption of the civil rights acts of 1964, 1965 and 1968.

Such picketing and demonstrations were aimed at altering discriminatory practices that had substantial official and public support in certain areas of the country. State and local officials, correctly realizing that these protests threatened to frustrate their policies of segregation, frequently sought to prevent protests whose peacefulness and orderliness was beyond dispute, but whose goals they disliked. State court injunctions and prosecutions of protesters resulted, and this Court was required on repeated occasions to intervene on behalf of the First Amendment rights of those opposed to racial discrimination. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Fields v. South Carolina, 375 U.S. 44 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963).

Picketing and other forms of public protest remain as vital tools in rectifying racial and social injustices. Today those devices are utilized to call attention to a variety of grievances with public officials, particularly claims of unremedied police brutality and unfair allocations of government services. The ability to

conduct those activities at a site relevant to the origin of the grievance is critical; the public and press would often notice and heed a group of pickets at city hall, but would rarely consider the same group in a vacant lot a mile away. Merchants are at times the focus of consumer picketing related, inter alia, to the price or quality of goods sold. All of these practices are implicated by the constitutional questions presented by this case.

This case has particularly important ramifications for a civil action now pending in the courts of Mississippi, Claiborne Hardware v. N.A.A.C.P. That action arose out of a 1966-69 boycott of white merchants by local civil rights activists who, believing that the merchants exercised de facto control over city officials, picketed the merchants in the hope that they would, in turn, cause those officials to end a variety of discriminatory practices. In 1976 a state court judge, sitting without a jury, branded these efforts an unlawful secondary boycott, and awarded $1,250,699 in damages against the defen-

dants, including the national N.A.A.C.P.[1/] If this award were sustained it would, without question, destroy the N.A.A.C.P. as an organization. In upholding the constitutionality of this award the Mississippi trial judge relied upon the same cases relied upon here by the N.L.R.B. Opinion dated August 9, 1976, pp. 55, 60. As a result of a boycott connected with a civil rights march in 1966 led by James Meredith, Mississippi awarded substantial damages against the Southern Christian Leadership Conference, injuring that organization's activities on behalf of minority rights. Southern Christian Leadership Conference v. A. G. Corporation, 241 So. 2d 619 (1970).

The pending litigation against the N.A.A.C.P. involves a statute which, as here, forbids the advocacy of consumer conduct which is itself legal. Section 97-23-85, M.C.A. 1972. That statute is broader than section 8(b)(4)(ii) of the National Labor Relations Act, in that it forbids not only picketing but any advocacy

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1/ The NAACP Legal Defense and Educational Fund, Inc., is not part of the N.A.A.C.P.

of a "secondary" boycott. While there are obvious differences between Clairborne Hardware and the instant case, any decision on the constitutional issues presented by this case would be of vital importance to the N.A.A.C.P. and all other civil rights organizations.

SUMMARY OF ARGUMENT

Section 8(b)(4)(ii) prohibits pickets from advocating, or communicating information to induce, certain types of consumer boycotts of merchants. Under the National Labor Relations Act, however, it would be perfectly legal for consumers to engage in such boycotts, or for merchants to give in to them. Regardless of the precise types of boycotts which cannot be induced by picketing, section 8(b)(4)(ii) is unconstitutional on its face because it forbids advocacy of lawful conduct.

Notwithstanding earlier decisions to the contrary, Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942), and its progeny have treated picketing in a manner drastically dif-

ferent than other types of speech or speech-conduct combinations. Ritter allows the government to regulate the content of the ideas expressed by pickets on a mere showing that such regulation furthers some official policy. This lax standard, which has never commanded the support of more than a bare majority of this Court, has been undermined by a number of recent decisions, and should be overruled.

Ritter and its progeny assume that, because the communicative aspect of picketing occurs in conjunction with conduct, e.g., patrolling, that the picketing can be regulated. But other decisions of this Court make clear that where speech and conduct are so combined, the government's regulatory authority extends only to the conduct aspect of the act, not to its communicative facets. Buckley v. Valeo, 424 U.S. 1, 17-19 (1976); United States v. O'Brien, 391 U.S. 367, 375-77, 381-82 (1968). Thus the conduct aspect of picketing confers on the government only authority to regulate the number or noisiness of pickets, not the substance of what they wish to say.

The purpose of section 8(b)(4)(ii) is to stop or reduce perfectly lawful consumer conduct by obstructing presentation of information about a labor dispute which might lead consumers to decide not to patronize a product or merchant. Ritter sanctions such government imposed silence as a method of achieving a state goal. But later decisions of this Court make clear that this is not a means available to the government under the First Amendment. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 96-97 (1977); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 769-70 (1976). If the government wishes to stop consumer boycotts, or merchant conduct based on such boycotts, it must do so by directly forbidding such boycotts or conduct, not by silencing advocacy of boycotts and conduct which are left lawful.

Once the government decides to leave the conduct of consumers to their own judgments, subject to debate about labor matters in the free marketplace of ideas, it cannot limit one party's access to that market. Both labor and business must be free to advocate in any peaceful manner

that consumers patronize or boycott a firm. Section 8(b)(4)(ii) interferes in that competition in a discriminatory manner. Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). Restrictions on advocacy of consumer boycotts are particularly suspect, since such boycotts of British goods were by far the most important non-violent method by which the colonists sought, often successfully, the repeal of British statutes to which they objected, including the Stamp Act, the Townshend Acts, and the Intolerable Acts. All of these boycotts were secondary, since the colonists' grievance was with the British government, not with the British merchants themselves.

Congress' decision to prohibit picketing while permitting unions to advocate by other means consumer boycotts may have been based on the view that picketing was an excessively effective form of communication. The First Amendment, however, forbids interfering with the speech of one party in order to enchance the relative voice of another. Buckley v. Valeo, 424 U.S. 1, 48-50 (1976).

ARGUMENT

SECTION 8(b)(4)(ii) OF THE NATIONAL LABOR RELATIONS ACT, INSOFAR AS IT FORBIDS PEACEFUL PICKETING ADVOCATING LAWFUL CONDUCT, IS UNCONSTITUTIONAL

The parties are in disagreement as to two questions arising under section 8(b)(4)(ii) of the National Labor Relations Act: first, whether N.L.R.B. v. Fruit and Vegetable Packers, 377 U.S. 58 (1964), correctly construed the statute to allow secondary picketing aimed solely at the struck product and, second, if so, whether that exception to the general prohibition against picketing to produce a "secondary boycott" applies to the facts of this case.

There is no dispute, however, as to the basic thrust of section 8(b)(4)(ii). A labor organization is forbidden to engage in peaceful picketing disclosing truthfully that a firm is selling the products of an employer involved in a labor dispute if, because of that picketing, consumers

decide not to patronize the firm so long as it deals in those products. It is also clear that the National Labor Relations Act in no way prohibits a consumer from actually withholding his or her patronage from a firm dealing in such disputed products; indeed, a union may urge consumers to do so so long as that advocacy is not by means of picketing. Section 8(ii); see Tree Fruits, 377 U.S. at 79 (Black J., concurring). Equally undisputed is that a firm may, on its own initiative or because of consumer or employee pressure, refuse to deal in products from a plant involved in a labor dispute. N.L.R.B. v. Servette, Inc., 377 U.S. 46, 50-51 (1964).

Section 8(b)(4)(ii) thus forbids union advocacy, by means of peaceful and truthful picketing, of actions by consumers, and action by the vendor, which are themselves "perfectly legal". Tree Fruits, supra. We believe that the First Amendment prohibits the government from forbidding the advocacy of lawful actions even where, as with picketing, that advocacy is conjoined with conduct. Accordingly, we urge that section 8(b) (4)(ii) is unconstitutional regard-

less of the correctness and meaning of the construction offered in Tree Fruits.

It may be possible to construe section 8(b)(4)(ii) so that its prohibitions do not apply to the facts of this case, thus avoiding a decision on the constitutional issues. But to do so would be to leave in effect a statutory prohibition, often enforced as here by an injunction that is a classic prior restraint, which both forbids and deters the communication of information and ideas. In the area of First Amendment freedoms this Court customarily relaxes its self-imposed rules of standing because of the "danger of tolerating ... the existence of a ... statute susceptible of ... improper application." Bigelow v. Virginia, 421 U.S. 809, 816 (1975). "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). In this case there is more than merely a danger that section 8(b)(4)(ii) will

be enforced as we have described; the N.L.R.B. actively pursues just such an enforcement policy, and unions throughout the country are inhibited from engaging in picketing which, in our view, is protected by the First Amendment. To continue, as in Tree Fruits, to avoid this constitutional problem by construing the statute to allow the particular picketing before the Court is to permit continued violations of the constitution in a far larger category of cases.

For reasons such as these this Court in Village of Schaumburg v. Citizens for a Better Environment, 48 U.S.L.W. 4162, 4165 (1980), proceeded to pass on the constitutionality of a prohibition against asserted First Amendment rights without deciding first if the prohibition would actually apply to the party seeking to challenge it. See also Babbitt v. Farm Workers, 60 L.Ed. 2d 895, 908-910 (1979). We believe the Court should do so here as well.

I. INTRODUCTION: THE SPECIAL TREATMENT OF PICKETING IN CARPENTERS AND JOINERS UNION V. RITTER'S CAFE, 315, U.S. 722 (1942), AND ITS PROGENY

The first constitutional decisions of this Court dealing with picketing treated it in the same manner as other forms of communication. In Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937), Justice Brandeis stated that union members might through picketing "make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." 301 U.S. at 478. Thornhill v. Alabama, 310 U.S. 88 (1940), struck down a blanket prohibition against picketing to persuade persons not to do business with a firm. It characterized picketing as a "practicable, effective means whereby those interested -- including the employees directly affected -- may enlighten the public on the nature and causes of a labor dispute." 310 U.S. at 104. A companion case, Carlson v. State of California, 310 U.S. 106 (1940), struck down a similar statute, explaining that "[t]he carrying of signs and banners ... is a

natural and appropriate means of conveying information on matters of public concern." 310 U.S. at 112-13. American Federation of Labor v. Swing, 312 U.S. 321 (1940), considered an injunction against picketing by any person who did not work for the employer being picketed; this Court found that prohibition "inconsistent with the guaranty of freedom of speech." It held that, even absent any actual dispute between the employer and the picketing employees, "[c]ommunication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can [not] be barred because of concern for the economic interests against whom they are seeking to enlist public opinion...." 312 U.S. at 326. See also Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 297 (1940).

Subsequent decisions established that pickets, like others engaged in the communication of ideas, could not ordinarily advocate illegal conduct. Even "pure speech" is generally not protected when its purpose is to produce unlawful activity. Dennis v. United States, 341 U.S. 494 (1951); Pittsburgh Press Co. v. Pittsburgh Commis-

sion on Human Relations, 413 U.S. 376 (1973). Probably a majority of the decisions in this Court upholding restrictions on pickets involved such advocacy of illegal conduct. In I.B.E.W. v. N.L.R.B., 341 U.S. 694, 705-6 (1951), the pickets sought to induce an illegal strike; thus the illegal conduct there advocated would have been on the part of those respecting the picket line. In Giboney v. Empire Storage and Ice, 336 U.S. 490, 492-3 (1949), the pickets sought to force the picketed firm to refuse to sell ice to non-union peddlers, which refusal would have violated state criminal law; there the advocated illegality would have been on the part of the picketed employer.2/

Section 8(b)(4)(i) of the National Labor Relations Act forbids employees of one employer from engaging in a strike or other job action to compel their employer to refuse to deal with another employer; it would be unlawful, where

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2/ See also Building Service Employees v. Gazzam, 339 U.S. 531, 553 (1950) (pickets sought to induce employer to compel his employees to join the union, which compulsion would have violated state law); Local Union No. 10 v. Graham, 345 U.S. 192 (1953) (pickets sought to induce employer to hire non-union labor, in violation of state right-to-work law.)

a vendor was selling products from a struck plant, for its employees to go on strike for that reason, or for the employees of yet a third party to refuse to make deliveries to the vendor. Thus picketing, or any other form of communication, aimed at inducing such a strike or other job action, could be prohibited, since the conduct advocated would be illegal. Hence in the instant case it would be constitutional to enjoin picketing which successfully urged the employees of the Safeco Group Companies to go on strike. See Local 761 v. N.L.R.B., 366 U.S. 667 (1961).

In sum, neither early cases such as Thornhill, nor the Giboney line of decisions, treat picketing differently than other methods of communication. Thornhill recognized that the conduct associated with picketing could be restricted if it in fact presented a "danger of destruction of life or property", 310 U.S. at 105, but this power did not extend to a regulation of the content of the ideas advocated by the pickets.

This Court departed sharply, and in our view incorrectly, from these decisions in its opinion in Carpenters and Joiners Union v. Ritter's Cafe,

315 U.S. 722 (1942). In Ritter the restaurant owner had hired a non-union firm to do construction at another site; a construction union picketed the restaurant, precipitating both a consumer boycott and a strike by the restaurant employees. Although, so far as appears from the opinion, neither the conduct of the consumers nor that of the striking restaurant employees was illegal under state law, the Texas court enjoined the picketing. This Court narrowly upheld that injunction on the ground that stopping the picketing furthered a state policy, whose wisdom the Court thought irrelevant, to protect "neutrals" from involvement in labor disputes. 315 U.S. at 728. Four members of the Court dissented from this departure from Thornhill. 315 U.S. at 729 (Black, J., dissenting), 732 (Reed, J., dissenting).

Eight years later Hughes v. Superior Court, 339 U.S. 460 (1950), extended Ritter to what was unquestionably a dispute with the employer being picketed; it upheld an injunction against picketing to induce a store owner to hire blacks in proportion to the number of blacks among its

customers. Such a hiring practice was declared by the state courts to be against state "policy." 339 U.S. at 446. This Court thought it irrelevant whether the quota hiring being sought would have been legal, 339 U.S. at 466, although there is some possibility it would have been held unlawful by the state courts. See 339 U.S. at 463-4. International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950), also involved a "primary" boycott. Union members picketed a firm which refused to work union hours; although the firm was a partnership with no employees, its longer hours obviously affected the willingness of other employers to stay open only during those hours. Again the Court narrowly upheld the injunction, the plurality opinion arguing that the injunction furthered a state "policy in favor of self-employment." 339 U.S. at 480.

The line of decisions commenced by Ritter ultimately led to International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 (1957). The facts in Vogt involved an attempt by pickets to induce an employer to force his workers to join a union, which compulsion apparently would have violated state law. 354 U.S. at 286. Rather than

relying on Giboney, the Vogt majority proceeded to analyze the case as if the pickets had advocated lawful conduct. It criticized Thornhill as unduly broad, 354 U.S. at 288-9, and characterized Ritter and similar cases as "reassessments" of Thornhill. 354 U.S. at 291. Vogt declared these cases "establish a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." 354 U.S. at 293. That rule was applied, again by a bare majority of the Court, in American Radio Association v. Mobile Steamship Association, 419 U.S. 215, 229-32 (1974), to upheld an injunction against pickets objecting to the shipping of goods on non-union foreign-registry vessels. That picketing precipitated a strike against all ships in the port, union and non-union alike, and thus arguably constituted an unfair labor practice in violation of section 8(b)(4)(i); but the case arose in state court where the advocated conduct, though "against state policy", was apparently legal.

Ritter and its progeny thus held that peaceful and truthful picketing, advocating lawful conduct, may be forbidden by the government if that advocacy may result in conduct which, though legal, is "against government policy." This rule is an aberration in First Amendment law; no other form of speech, or speech-plus-conduct, may be forbidden on such a ground. In several of the cases in which the doctrine has been applied the picketing could have been prevented on another basis.

Most importantly, several recent lines of decisions in this Court have undermined the reasoning on which Ritter and the cases which follow it are based. As we set out in detail below, these recent decisions cannot be reconciled with the standard set by Ritter and applied as recently as American Radio Association. We urge, accordingly, that Ritter be overruled.

II. THE CONJUNCTION IN A SINGLE ACT OF CONDUCT AND SPEECH CONFERS UPON THE GOVERNMENT ONLY THE AUTHORITY TO REGULATE THE CONDUCT ASPECT OF THAT ACT, NOT THE CONTENT OF THE SPEECH

Although Ritter itself does not explain why picketing is any different than pure speech,

Hughes,[3] Hanke,[4] Vogt[5] and American Radio Association[6] all emphasize that picketing involves not just the communication of ideas, but entails "conduct" as well. The only aspect of the conduct specifically referred to is "patrolling", walking back and forth in front of the site being picketed. As this Court explained in another context, "picketing involves elements of both speech and conduct, i.e., patrolling, and ... because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech." Food Employees v. Logan Valley Plaza, 391 U.S. 308, 313 (1968).

The conclusion which the Ritter progeny draw from the presence of this conduct element is that the speech-conduct admixture of picketing becomes, in the words of Hanke, "a hybrid". 339 U.S. at

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3/ 339 U.S. at 464-5.

4/ 339 U.S. at 474.

5/ 354 U.S. at 289, 290.

6/ 419 U.S. at 229.

474. The protections accorded speech are not merely reduced by the incidental impact of regulation of the associated conduct, such as limits on the number of pickets. Rather, these cases hold that the speech aspects of picketing as such enjoy less protection because they are somehow tainted by association with the conduct. While speech by itself can be restricted only to protect "a subordinating interest which is compelling", First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978), the ideas communicated by picketing are said to be subject to restriction to advance any valid state policy.

Picketing, however, is not the only form of communication that combines speech with conduct. Marching, demonstrations, meetings, and door-to-door canvassing involve conduct. Indeed, virtually all of the effective methods for the widespread dissemination of ideas involve some form of conduct. The decisions of this Court regarding

such other speech-conduct combinations establish constitutional standards clearly inconsistent with those in Ritter and its progeny.

The earliest cases dealing with this problem conerned the licensing of parades and demonstrations. From Hague v. C.I.O., 307 U.S. 496 (1939), to Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), this Court has drawn a consistent distinction as to the basis on which parade permits could be given or withheld. A constitutionally valid statute must limit that permit decision to considering whether the time, place and manner of the march would disturb the public. See Hague v. C.I.O., 307 U.S. at 516; Shuttlesworth v. Birmingham, 394 U.S. at 154-156; Cox v. New Hampshire, 312 U.S. 569, 576 (1941). The regulatory power stems from the government's "duty and responsibility to keep [its] streets open and available for movement", Shuttlesworth v. Birmingham, 312 U.S. at 152, and extends only so far as that duty and responsibility require. Hague warned that this discretion could not be so exercised with regard to the content of the views being expressed in the parade as to become an instrument for "suppression of free expression of views", 307 U.S. at 516, and

Cox cautioned that the licensing must be made "without unfair discrimination." Cox, 312 U.S. at 578, and Shuttlesworth, 394 U.S. at 152, both appear to assume that for constitutional purposes parades and picketing are indistinguishable.

The strong indication in the parade cases that the government can regulate only the conduct aspect of a conduct-speech combination is confirmed by decisions in other areas. Justice Black, concurring in Tree Fruits, argued that the statute at issue in the instant case was unconstitutional because it undertook to regulate, not the conduct of the pickets, but the content of the ideas being advanced by them.

> The statute in no way manifests any government interest against patrolling as such, since the only patrolling it seeks to make unlawful is that which is carried on to advise the public, including consumers, that certain products have been produced by an employer with whom they have a dispute. All who do not patrol to publicize this kind of dispute are, so far as this section of the statute is concerned, left wholly free to patrol. Thus the section is aimed at outlawing free discussion of one side of a certain kind in a labor dispute and cannot be sustained as a permissible regulation of patrolling. 377 U.S. at 78-79.

Such regulation of speech was subject to the usual stringent constitutional standard, and

therefore invalid. 377 U.S. at 79. Justice Douglas advanced the same distinction in Food Employees v. Logan Valley Plaza, 391 U.S. at 326. "Picketing is free speech plus, the plus being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated."

The full Court adopted this distinction two months after Food Employees in United States v. O'Brien, 391 U.S. 367 (1968), "[W]hen 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify the incidental limitations on First Amendment freedoms." 391 U.S. at 376. (Emphasis added). While the amount of government interest involved was not the stringent "compelling interest" standard, the Court emphasized that the interest must be "unrelated to the suppression of free expression". 391 U.S. at 377. O'Brien explained the earlier decision in Stromberg v. California, 283 U.S. 359 (1931), striking down a statute forbidding the use of a flag to express opposition to the government, in light of this distinction. "Since the statute

there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." 391 U.S. at 382. Justice Black's concurring opinion in Tree Fruits was cited with apparent approval. Id.. In Buckley v. Valeo, 424 U.S. 1 (1976), the Court held that, even though independent political expenditures might involve an element of conduct, regulation of such expenditures was nonetheless subject to the usual stringent First Amendment standards because the government's "interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful'." 424 U.S. at 17. See also First National Bank of Boston v. Bellotti, 435 U.S. 765, 786, n.23 (1978).

These cases make clear that when speech and conduct are combined in a parade, the display of a flag, the expenditure of funds to influence an election, or the destruction of a draft card, that combination gives to the government no power to control the substance of the speech involved; only regulation of the conduct is exempt from the usual stringent First Amendment standard.

Picketing is no different. Cox and Shuttlesworth treat parades and picketing as indistinguishable. The majority opinion in O'Brien relies on Justice Black's opinion in a picketing case. Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), expressly held that a limitation on the "subject matter" of picketing cannot be regarded, or upheld, as a "time, place and manner" regulation. 408 U.S. at 97-99.

The conduct element in picketing, which often involves only one or two individuals,[7/] is modest by comparison to the thousands of demonstrators in Shuttlesworth or to other parades and public meetings. The most noted form of conduct involved in picketing is patrolling, walking back and forth in front of a particular site. In fact such movement is not necessarily regarded by the pickets as essential to their activity; often the pickets prefer to stand still, and only move because directed to do so by a police officer. That

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7/ See, e.g., International Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 472 (1950) (one picket); Local 10 v. Graham, 345 U.S. 192, 199 (1953) (one or two pickets); N.L.R.B. v. Fruit and Vegetable Packers, 377 U.S. 58, 60 (1964) (two or three pickets); Police Department of Chicago v. Mosley, 408 U.S. 92, 93 (1972) (one picket).

one or two people walk back and forth on a path a few yards long seems hardly more "conduct" than if they stood still. A lecturer pacing back and forth the same distance would not ordinarily be described, on that account, as engaging in "speech plus"; indeed, certain classical Greek philosophers are known as the Peripatetics because it was the practice of Aristotle to walk through the Lyceum as he discoursed with his pupils. If the union members in this case had "patrolled" in front of the Safeco affiliates carrying handbills, an injunction based on the content of those leaflets would be treated as a prior restraint on free speech. The applicable legal standard is no different because here they carried signs instead.

III THE FIRST AMENDMENT PRECLUDES INTERFERENCE WITH ADVOCACY OF, OR COMMUNICATION OF FACTS INTENDED TO INDUCE, LAWFUL CONDUCT

The restriction contained in section 8(b)(4)(ii) is unquestionably aimed at the substance of the views being advanced by union pickets. For the reasons set forth in part II, the constitutional standards applicable to such a restriction are the same as those which would apply if the law forbad handbills, parades, speeches or books advocating the same sort of boycott, or describing

the same underlying labor dispute.[8/]

The legislative history of section 8(b)(4)(ii) leaves no doubt that Congress intended that section, at the least, to sharply reduce the number and effectiveness of consumer boycotts. Whether the public interest in even eliminating these boycotts would constitute "a subordinating interest which is compelling", First National Bank of Boston v. Bellotti, 435 U.S. at 786, may well be doubted; had Congress thought the matter of such great importance it would have flatly prohibited consumer boycotts, as it had earlier forbidden secondary employee action, rather than merely partially obstructing advocacy of such conduct. The Court need not, however, resolve that question, for several decisions of this Court make it clear that, regardless of the importance of the goal involved, Congress chose an impermissible means by which to achieve it.

(1) The conduct sought by union pickets subject to section 8(b)(4)(ii) is itself entirely

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8/ The House version of section 8(b)(4)(ii) contained just such a sweeping prohibition against communication. See Tree Fruits, 377 U.S. at 66-69.

lawful. A consumer may completely refuse to patronize a Safeco affiliate because of the labor dispute at Safeco, and an affiliate, because of such a boycott, or otherwise, could legally transfer its business from Safeco to another firm. The National Labor Relations Act neither forbids these actions nor places any obstacle whatever in the way of a consumer or vendor that decides to take them. What the Act seeks, rather, is to prevent a union from providing a consumer with the information or arguments which might lead to such a boycott. Congress, apparently believing that many consumers would engage in a boycott if they knew that a union wanted them to do so, or perhaps merely upon learning that a vendor was selling products from a struck plant, forbad unions from providing that information to consumers in the manner which Congress, employers, and unions alike recognize as the most direct, effective and inexpensive method of communication -- picketing.

This Court has repeatedly held that the government cannot, consistent with the First Amendment, seek to prevent otherwise lawful conduct by suppressing the information on which

that conduct depends. In Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976), Virginia sought to prevent consumers from choosing among pharmacists on the basis of their charges by forbidding the advertising of those fees. This Court held that, while the state could limit competition in other ways,

> it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. 425 U.S. at 770.

In Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977), town officials sought to reduce panic selling of homes by forbidding the posting of "for sale" signs in front of houses, thus preventing homeowners from knowing how many houses in their neighborhood were on the market. In invalidating that ordinance this Court reasoned that, however laudable the township's goal might be, "the First Amendment disabled [it] from achieving its goal by restricting the free flow of information." 431 U.S. at 95. Here, as in Linmark and Virginia Pharmacy, the suppression of

information is not complete; while the most effective and traditional manner of communication has been forbidden, other more cumbersome methods remain. But Linmark and Virginia Pharmacy condemned regulating conduct by suppressing information, however partial or imperfect that suppression might be.

(2) Here, unlike Linmark and Virginia Pharmacy Board, the suppression is intended to tip in favor of one side a public debate regarding alternative courses of action.

In those cases the suppressed information was of importance to the potential seller and buyer respectively, but bore little if at all on any contest of ideas between adverse parties. Here, however, the primary effect of whether a consumer boycotts a vendor is not on the consumer, who can presumably buy similar goods or services elsewhere, but on the union which favors, and the vendor and struck employer which oppose, that boycott. In the contest for the support of consumers, the employer will defend its conduct in the labor dispute, and the vendor will urge that it not be penalized for merely selling a product from the disputed employer. The union in turn

will argue the merits of its position in the primary dispute, and the importance of consumer support to bring about the successful conclusion of the strike or other job action. But in a society where some consumers will ordinarily support a boycott urged by a union, and where few consumers will know about labor disputes at often distant plants, or about the presence of merchandise from such plants on a merchant's shelves, merely informing the consumer that the union advocates a boycott and why is likely to be of critical importance. "When we prohibit consumer picketing we compel the public, through ignorance of the situation, to side with the employer rather than the union. We prevent the consumer from making his own choice." 105 Cong. Rec. 16397 (daily ed., Sept. 3, 1959), (remarks of Sen. Morse).

The prohibition of speech involved here is thus far from neutral. The employer and vendor are entirely free to engage in any solicitation they please to entice consumers to shop at the vendor's store or buy the struck product, while section 8(b)(4)(ii) forbids the union to use its most effective means of communication, picketing, to reveal to consumers that the union wants them

to exercise their legal right to boycott the vendor. Indeed, it is only a labor organization that is forbidden to picket for such a secondary boycott; if, for example, the vendor refused to handle the struck product, the employer could send agents to picket the vendor, urging consumers to boycott the vendor because of that action. Even if the statute forbad the use of pickets by all parties, that would not render it equitable. A labor law cannot be described as fair because it forbids union members and high corporate officials alike to walk picket lines, leaving both free to publicize their views through full page advertisements in the New York Times or commercials on network television. Such lavishly expensive methods may be within the reach of large corporations, but "[p]icketing is ... the working man's method of giving publicity to the facts of industrial life." Local Union No. 10 v. Graham, 345 U.S. 192, 202 (1953) (Douglas, J., concurring).

Congress, by refusing to prohibit consumer participation in secondary boycotts, has chosen to leave the consumer's decision whether to boycott a vendor dealing in stuck products to the free marketplace of ideas; having so chosen, Congress

cannot constitutionally restrict the access of one contestant to that market. In Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), this Court struck down an ordinance which permitted labor unions, but not others, to picket near open school buildings.

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. ... There is an "equality of status in the field of ideas," and government must afford all points of view on equal opportunity to be heard. 408 U.S. at 96.

These considerations apply a fortiori where the restriction forbids, not all discussion of a particular topic, but only advocacy by one side of a particular point of view. See also Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring).

(3) Suppression of speech is permitted, if at all, only in the presence of a compelling public interest, First National Bank of Boston v. Bellotti, 435 U.S. at 786, because there, faced with a conflict between speech and a public policy of extraordinary importance, the government may be permitted to prefer the latter. But that

justification requires a demonstration that the speech and policy are in conflict, a demonstration which cannot be made where the government has not sought to utilize methods short of censorship to achieve its goals. Thus in Virginia Pharmacy Board, 425 U.S. at 770, and in Linmark, 431 U.S. at 97, this Court emphasized that the government had not sought to achieve its goals by regulating conduct rather than by suppressing information. As a general matter, whatever the public policies involved, an enactment suppressing advocacy of lawful conduct must fall because a less constitutionally offensive means, regulating the conduct itself, has not been utilized.

(4) There are, of course, situations in which the constitution itself protects particular conduct; in such a case the government cannot circumvent that protection by forbidding advocacy of the constitutionally protected behavior. See Bigelow v. Virginia, 421 U.S. 809, 822-826 (1975). Such considerations may well be present here. In the decade leading to the Revolution the primary method utilized by the colonists to advance their interests was what we would now describe as a secondary boycott. Aggrieved

successively by the Stamp Act, the Townshend Acts, and the Intolerable Acts, the colonists joined in increasingly effective agreements to refuse to purchase British goods until the measures were repealed. In 1774, for example, the Continental Congress adopted a resolution agreeing to refuse, until the Intolerable Acts wre rescinded, to "import into British America, from Great Britain or Ireland, any goods, wares, or merchandize whatever".[9/] The British government, which had enacted the disputed measures, was not the vendor of these goods, and did not suffer directly from the boycott. But the colonists reasoned that the British merchants who would be damaged would in turn use their considerable influence to obtain repeal of the objectionable legislation. That is precisely what in fact occurred.[10/]

The patriots who led the nation through these painful, but at times successful, boycotts, were in

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9/ H.S. Commager, Documents of American History, p. 85 (7th Ed., 1963).

10/ S.E. Morrison, Oxford History of American People, pp. 197-200, 208 (1963). Petitions from London merchants urging repeal of these measures are set out in H.S. Commager, Documents of American History, pp. 59-60, 87-88 (7th Ed., 1963).

many cases the same men who framed and brought about the adoption of the Constitution and the Bill of Rights. It seems unlikely that they would have authorized the Congress to strip Americans of what had been one of the most important political tools of the era leading to the Revolution. A consumer's privilege to withhold his or her patronage for political or social reasons, such as supporting trade unions, may well be numbered among the rights reserved to the people by the Ninth and Tenth Amendments. At the very least, advocacy of such boycotts, in which virtually every colonial leader engaged at some point between 1765 and 1775, must be viewed as enjoying a particularly high level of constitutional protection.

(5) If, as we urge, the government cannot forbid advocacy of lawful conduct, the distinction between such speech and advocacy of unlawful conduct will not always be clear. Although, for example, union pickets may urge a secondary consumer boycott of a vendor, they may not urge an unlawful job action against that vendor by his or other employees. Where the pickets' signs, whatever their content, provokes such a job

action, the Board could constitutionally require the union to take whatever steps were necessary to halt that impact, including removing the pickets if necessary. In this case, however, the picketing in fact produced neither a work stoppage at, nor interference with deliveries to, the Safeco affiliates. App. 10-20. In other situations a single communication may unavoidably bring about both legal and illegal conduct; thus while the sale of cigarettes to minors is generally unlawful, there is no effective manner by which cigarette advertising could be framed to encourage smoking by adults alone. Under such circumstances a dual impact communication could be prohibited.

IV. THE FIRST AMENDMENT PRECLUDES INTERFERENCE WITH A PARTICULAR METHOD OF ADVOCACY OR COMMUNICATION BECAUSE THAT METHOD IS THOUGHT TO BE EXCESSIVELY EFFECTIVE

Congress acted to forbid certain picketing because it believed picketing was the most important and effective method by which a union urged people to boycott a vendor. The legislative history set out in detail by Safeco suggests Congress may have felt that picketing was in a sense too effective, that it would too easily

succeed in persuading consumers not to patronize a vendor or, perhaps, not to buy a product. Actual experience, of course, is often to the contrary; recent union-supported boycotts of nonunion lettuce and of clothes produced by the J.P. Stevens Company have met with uneven results. Union members at times cross picket lines, not only to shop, but also to work. However, even if a picket line had the galvanizing effect that Congress may have believed, that would not be a legitimate basis for restricting its use.

The possibility that some form of advocacy could be forbidden because it was thought "unduly" effective at promoting the advocated, and entirely lawful, action, has been consistently rejected by this Court. In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), a prohibition against corporate expenditures to influence referenda was defended on the ground that, because of their great wealth, corporate advocates could overwhelm opposing points of view. This Court found that argument constitutionally untenable:

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that the advocacy may persuade the electorate is

> hardly a reason to suppress it: the Constitution "protects expression which is eloquent no less than that which is unconvincing." 435 U.S. at 790.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Court disapproved on similar grounds a ceiling on direct expenditures in support of candidates:

> It is argued ... that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation. ... But the concept that government may restrict the speech of some elements of our society in order to enchance the relative voice of others is wholly foreign to the First Amendment.... 424 U.S. at 48-49.

Mills v. Alabama, 384 U.S. 214 (1966), rejected the suggestion that election day newspaper editorials could be prohibited because they might have a disproportionate effect on the electorate.

These decisions apply a fortiori to peaceful picketing. Picketing is particularly effective for three reasons. First, its message is delivered at the time and place where a consumer decides whether to patronize the vendor or buy the struck product. But this does not involve any

exaggerated impact of the message on the people to whom it is relevant, only the efficiency of avoiding giving that message to the vast majority of the population who would never deal with the vendor anyway. Targeting communication at the audience which will act on it is the normal practice in all areas of speech.

Second, the message is presented on a sign, whose content can be gleaned by consumers from a distance, affording them time to reflect on its contents before they reach the door of the vendor. The sign may be read by consumers who would be reluctant to accept a handbill, or who would take a leaflet but only read it, if at all, after they had left the vendor's premises. A two foot square sign, which often consists of a 50 cent piece of cardboard on which the picket has hand written his or her message, is among the most modest conceivable methods of written communication. The use of such signs is a universally available method of written speech, accessible to the vast majority of the population unable to afford the multimillion dollar advertising campaigns approved in First National Bank and Buckley, or to buy and editorialize through

the newspaper involved in Mills, and even to those so impecunious that they cannot afford to print handbills or leaflets. If there is a serious imbalance of communicative ability between such a sign in the hands of a lone picket, and a corporate employer or vendor which can spend millions of dollars on sophisticated radio, television and newspaper advertisements promoting its goods or services, that imbalance surely is not one which favors the sign.

For some, particularly union members or supporters, a picket line may be vested with special importance. For them, though clearly not for others, "[t]he loyalties and responses evoked and exacted by picket lines are unlike those following from appeals by printed word". Hughes v. Superior Court, 339 U.S. 460, 464-5 (1950). But if certain individuals have a particular sense of loyalty evoked by a picket line, that is not because human beings are born with an instinctive respect for picket lines. On the contrary, a picket line in 1800 would have provoked no particular response other than public curiosity, and today an anti-union picket line objecting that an employer hired union members

would not provoke the reaction referred to in Hughes. The public response to a picket line is obviously dependent on the identity of the pickets and the content of their message.

Any special respect accorded union picket lines is the result of a century of argument and debate, repeated within each generation, as to whether working men and women ought to support one another during periods of labor negotiations and strikes. Advocates of the union movement have urged their members and others that improvements in the terms and conditions of employment require such outside assistance, and that individuals not directly involved in the dispute could or should rely on the union concerned to select appropriate goals or tactics. The correctness or wisdom of such associational or ideological loyalties are not matters into which the government can inquire. Loyalty to a union, or the union movement, and deference to its views, are not different in principle from similar loyalties and deference to one's employer, the chamber of commerce, a political party, or a religious organization. Much of the free speech which occurs in our society is directed at producing just such allegiances.

To implement this loyalty unions have for years sought with some success to establish the picket line as the generally accepted method by which a labor organization indicates to its supporters that it wishes them to take some action with regard to the site involved. In an earlier era unions used different methods, such as handbills,[11/] or urging supporters to patronize only stores displaying a union card in their windows. International Brotherhood of Teamsters v Hanke, 339 U.S. 470 (1950). Today the International Ladies Garment Workers Union broadcasts commercials urging consumers to "look for the union label", in the hope they will buy only clothes which have such a label. These devices are similar to the forms of communicative shorthand used by other organizations and institutions.

When union labels, union cards, or union picket lines are extremely effective methods of communication, that is not because labels, cards, or picket lines have some mysterious and talismanic significance, but because management

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11/ See M. B. Schnapper, American Labor: A Pictorial Social History, 245-47 (1972).

has for the time being lost the debate for the loyalties of the American public concerning labor disputes in general, or as to the particular labor dispute involved. To the extent that management has lost the debate regarding whether consumers should heed the call to action signaled by labels, cards or pickets, the government can no more seek to compensate for the unpersuasiveness of management arguments by forbidding use of such signals than it could seek to compensate for the momentary unpopularity of the Democratic party by forbidding Republicans from disclosing the party to which they belonged.

CONCLUSION

For the above reasons Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942), should be overruled. Section 8(b)(4)(ii) of the National Labor Relations Act, insofar as it forbids peaceful picketing advocating lawful conduct, should be declared unconstitutional. Accordingly, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

intervenor's brief